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Namvar Taghipour and Danesh Rahemi, M.D., individuals and Jerez Taghipour and Associates, LLC, a Utah limited liability company v. Edgar C. Jerez, an individual, and Mount Olympus Financial, L.C..a Utah limited liability company : Brief of Appellee

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

NAMVAR TAGHIPOUR and DANESH RAHEMI, M.D., individuals, and JEREZ TAGHIPOUR AND ASSOCIATES, LLC, a Utah limited liability company, Plaintiffs and Appellants, v. EDGAR C. JEREZ, an individual, and MOUNT OLYMPUS FINANCIAL, L.C.. a Utah limited liability company, Defendants and Appellees.	Civil No. 20010450-SC

BRIEF OF APPELLEE MT. OLYMPUS FINANCIAL, L.C.

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JURISDICTION

This Court granted certiorari on August 14, 2001. The Court has jurisdiction pursuant to Utah Code Ann. §78-2-2.

ISSUE PRESENTED AND STANDARD OF REVIEW

The following issue is presented for review in the Appeal:

Under Utah Code Ann. §48-2b-127, is a mortgage executed by the manager of a limited liability company valid and binding on the limited liability company?

The standard of review for this issue, which was decided in the affirmative on Motion to Dismiss pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, and affirmed on appeal by the Court of Appeals, is correctness and no deference is given to the decision of the trial court or the court of appeals. E.g., Mounteer v. Utah Power & Light Co., 823 P.2d 1055 (Utah 1991).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

The following portion of the Utah Limited Liability Company Act, codified at Utah Code Ann. §48-2b-127 of the Utah Code is determinative of the issue on appeal:

> Instruments and documents providing for the acquisition, mortgage or disposition of property of the limited liability company shall be valid and binding upon the limited liability company if they are executed by one or more managers of a limited liability company having managers.

Utah Code Ann. §48-2b-127.

STATEMENT OF THE CASE

On June 18, 1999, Plaintiffs sued Mt. Olympus and Jerez, asserting claims against Mt. Olympus for : (1) declaratory judgment, (2) negligence, and (3) partition. In response, Mt. Olympus filed a Motion to Dismiss. The Honorable Anne M. Stirba granted Mt. Olympus's motion, ruling that pursuant to Utah Code Ann. §48-2b-127(2), the documents executed by Jerez were binding upon the LLC. Appellants appealed and the Court of Appeals affirmed Judge Stirba's ruling on April 26, 2001. See Appendix "B." This appeal ensued.

On August 20, 1994, Namvar Taghipour, Danesh Rahemi, and co-defendant Edgar Jerez (Jerez) formed Jerez, Taghipour and Associates, LLC (the LLC)[1]. The group formed the LLC to purchase and develop a parcel of real estate (the property) under a joint venture agreement. The LLC's Articles of Organization listed Jerez as a LLC member and manager.

On August 31, 1994, the LLC acquired the Property. On January 10, 1997, three and one-half years later, the LLC through its manager, Jerez, entered into a loan agreement for $25,000.00 with Mt. Olympus. To secure the loan, the LLC through its manager, Jerez executed, and delivered a trust deed on the Property to Mt. Olympus. Subsequently, Mt. Olympus dispersed $20,000.00 of the funds to the LLC and applied the remaining $5,000.00 for various loan related fees. Jerez apparently misappropriated the $20,000.00. As the managing member Jerez owed fiduciary duties to the LLC. Jerez breached his fiduciary duties and failed to abide by the terms of his agreement with Appellants[2]. The LLC, ultimately defaulted on the loan and Mt. Olympus

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[1] See Appellants' Complaint, Appendix "A"

[2] The Complaint alleges that the operating agreement provided that no loan could be contracted without the consent of all members of the LLC.

foreclosed on the Property. Appellants did not at any time offer to repay any portion of the loan to Mt. Olympus.

Appellants misstate the allegations of their Complaint. Appellants state that Mt. Olympus, "did absolutely no due diligence of any kind," other than verifying that Jerez was the manager of the LLC[3].

Appellants also state that

> Only after the **redemption period for the** foreclosure sale had expired did the Appellants learn that the property had been mortgaged by Jerez to obtain the loan. (Emphasis added).

This allegation reflects the wording from paragraph 23 of the Complaint except the portion underlined, "redemption period for the." The sale was a non-judicial trustee sale which has no redemption period let alone a redemption period "after" the sale. See Utah Code Ann. §57-1-21 et seq. Arguably, the three month period after the Notice of Default is recorded could be considered a redemption period of some kind. If that is what is meant by Appellants then they have added an admission that they had knowledge of the circumstances prior to the trustee sale[4].

SUMMARY OF THE ARGUMENT

Because it is the policy of law to encourage the alienability of property and the free flow of commerce the legislature has made provisions in Utah Code Ann. §48-2b-127 for third parties to rely upon the representation of LLC's managers when dealing with property. There is no conflict between Utah Code Ann. §§48-2b-125 and 48-2-b127, the former defines the rights between management and members of the LLC and the latter between third parties and the LLC.

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[3] This is not supported by the Complaint, is irrelevant and is argument, not fact statement.

[4] If that is not what was intended one must question why the words were added.

This is not simply a case of first impression but rather a case of only impression that will affect the rights of only these parties because the legislature has repealed the statutes in question. The cases cited by Appellants support Mt. Olympus's argument that when a manager acts within the apparent (in the case stated) and ordinary course of the LLC's business Mt. Olympus could rely upon the representations of the LLC's manager. Equity also requires that rather than Mt. Olympus suffering for the bad acts of the LLC's manager the partners of the manager should suffer because they created the circumstances that made the loss possible-- they are the ones that clothed him in managerial authority, they are the ones that could have limited his authority, they are the ones that should have been monitoring his activities and their property.

The creation of Utah Code Ann. §48-2c-802 rather than limiting the authority of the LLC's manager, clarifies and expands the manager's authority. Where the Articles of Organization, the public document giving constructive notice to person dealing with the LLC, does not limit the manager's authority, the manager may bind the LLC and the documents signed by the manager, in this case the note and trust deed, shall be "conclusive" in favor of the person, in this case Mt. Olympus, who gives value without knowledge of any lack of authority. No inquiry beyond the Articles of Organization was or is required.

Whether under general principles of partnership law, Utah Code Ann. §48-2b-127 or the new Utah Code Ann. §48-2c-802, Mt. Olympus had the right to rely upon Jerez as the publicly declared manager of the LLC.

ARGUMENT

I. THE TRUST DEED OBTAINED BY MT OLYMPUS AND SIGNED BY APPELLANTS' MANAGER IS VALID AND BINDING AS A MATTER OF LAW AND APPELLANTS' COMPLAINT WAS PROPERLY DISMISSED.

A. UNDER UTAH CODE ANN. §48-2b-127 MT. OLYMPUS COULD RELY ON JEREZ'S SIGNATURE AS THE MANAGER OF A LIMITED LIABILITY COMPANY WITHOUT FURTHER INQUIRY.

While pleading several causes of action against Mt. Olympus, Appellants' claims all boiled down to one legal question -- whether the limited liability company can escape responsibility for a mortgage executed by its manager. The Utah Legislature answered that question when it enacted the Utah Limited Liability Company Act. Utah Code Ann. §48-2b-127 specifically states in part:

> Instruments and documents providing for the acquisition, mortgage or disposition of property of the limited liability company shall be valid and binding upon the limited liability company if they are executed by one or more managers of a limited liability company having managers.

Significantly, this section of the statute, dealing with the alienability of property, does not contain the limiting language "unless otherwise provided in the articles of organization or operating agreement" which limitation is the crux of Appellants' argument. That language is found only in Utah Code Ann. §48-2b-125 dealing with transactions having a lesser impact on commerce[5]. Certainly had the Legislature intended that limitation apply in the specific context

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[5] Judge Orme in his concurring opinion in this case suggests that this result was "not so much the product of carefully weighed policy considerations as it is the product of legislative oversight or lapse." However, Mt. Olympus avers that Utah Code Ann. §48-2b-127, the newly created Utah Code Ann. §48-2c-802, as well as similar statutory schemes such as Utah Code Ann. §48-1-6 are, exactly that, the products of careful legislative considerations that facilitate commerce and sustain and promote the longstanding public policy of the free alienability of property.

of mortgages, they would have incorporated similar language in Utah Code Ann. § 48-2b-127[6].

However, when the Legislature amended Utah Code Ann. §48-2b-125 in 1992 and again in 1996 it chose to leave that limiting language out of Utah Code Ann. §48-2b-127. The only logical conclusion, therefore, is that the Legislature, in the context of documents dealing with alienability of property, because of their importance to the free flow of commerce, opted for clarity and reliability of the instrument.

Contrary to Appellants' argument, this reading of the statute does not create a conflict in the statutory scheme. Legislation often lays out the general case, then prescribes different rules in specific contexts. We even have a canon of statutory construction that recognizes this recurrent method of legislating. Where a specific statutory term applies, it takes precedence over a general pronouncement. Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 974 P.2d 1194, 1203 (Utah 1999).

As applied to this statute, that canon of construction leads to the perfectly logical conclusion that when dealing with important transactions, vital to the economic health of the state, such as alienability of property, the Legislature wanted clarity and enforceability. It is not surprising that the Legislature should have made this specific direction in Utah Code Ann. §48-2b-127 with regard to real estate transactions, while preserving a more structured approach regarding other transactions in Utah Code Ann. §48-2b-125. Alienability of property is regarded as an essential characteristic of a healthy and robust economy. It is the "policy of law...to keep

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[6] Appellants' reliance on the repeal of Utah Code Ann. §§48-2b-125 and 127 and the creation of Utah Code Ann. §48-2c-802 is misplaced. Under this new provision the mortgage obtained by Mt Olympus and signed by Jerez would have been binding and valid. The new statute clarifies and increases the authority of the manager unless expressly limited in the articles of organization--a public document giving constructive notice of the limitation.

land titles clear and encourage alienability of property rather than the contrary," Boyle v. Baggs 350 P.2d 622 at 625 (Utah 1960). See also Capital Assets Financial Servies v. Maxwell 994 P.2d 201 (Utah 2000); Lee v. Gaufin 867 P.2d 572 (Utah 1993); John Wagner Associates v. Hercules, Inc. 797 P.2d 1123 (Utah App. 1990); Redd v. Western Sav. & Loan Co. 646 P.2d 761 (Utah 1982); Neves v. Wright 638 P.2d 1195 (Utah 1981). This conclusion is further supported by the Legislature again dealing with this issue and enacting Utah Code Ann. §48-2c-802 which states in part:

> (3) Notwithstanding the provisions of Subsections (1) and (2), **unless the articles of organization** [the public document] expressly limit their authority... any manager in a manager-managed company, may sign, acknowledge, and deliver any document transferring or affecting the company's interest in real or personal property, and if the authority is not so limited, the document shall be conclusive in favor of a person who gives value without knowledge of the lack of authority of the person who signs and delivers the document.

(Emphasis added.)

In fact, it is Appellants' interpretation that does violence to the language employed by the Legislature. If Appellants' interpretation is adopted an instrument is not valid and binding on the limited liability company when executed by a manager, but only if the lender performs some unquantified "due diligence."[7] As a matter of law, that is not required.

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[7] Under such a scheme the lender would never know that it had done enough or that it would not be hauled into court on every loan it makes to a limited liability company and the alienability of property would be stymied.

B. CONTRARY TO APPELLANTS' ASSERTION, MT OLYMPUS OWED NO DUTY TO APPELLANTS IN THIS COMMERCIAL MORTGAGE TRANSACTION.

Central to each of the causes of action pleaded by Appellants is the allegation that Mt Olympus owed some duty to Appellants to verify that Jerez was not acting outside the scope of his authority set forth in the operating agreement. For instance, in the Third Claim for Relief,[8] captioned "Declaratory Judgment", Appellants alleged:

> The [Appellants] are entitled to declaratory judgment that the Olympus Loan and the accompanying mortgage of the Property and subsequent foreclosure were invalid because Olympus failed to determine that Jerez [the manager] did not have the power to take the actions that he did under the Articles and Operating Agreement of the L.C.

Appendix "A" at ¶ 37. In the Fourth Claim for Relief, captioned "Negligence", Appellants alleged that Mt Olympus owed Appellants a duty which was breached because "Olympus failed to verify whether or not the managing member could mortgage the corporate property to secure a debt." Appendix "A" at ¶ 41.

Mt Olympus' Motion to Dismiss was premised on the simple proposition that Mt Olympus had a statutory right to rely on the signature of Appellants' manager to make its mortgage valid. In this regard, the Legislature has spoken and unambiguously stated:

> Instruments and documents providing for the acquisition, **mortgage**, or disposition of property of the limited liability company **shall be valid and binding upon the limited liability company if they are executed by one or more managers of a limited liability company having a manager. . . .**

Utah Code Ann. §48-2b-127(2). (Emphasis added.)

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[8] Mt Olympus was named only in the Third, Fourth, Fifth and Seventh Claims for Relief.

Under this statute, the only thing required for Jerez to enter the mortgage at issue is that he be the manager of the limited liability company. Since the Complaint pleaded that they selected Jerez as the manager and he was acting in that capacity, Appendix "A" at ¶ 12, there can be no facts that deprive Mt Olympus of the statutory right to rely on his signature to take a mortgage on this property. Thus, Judge Stirba correctly granted Mt Olympus' Motion to Dismiss.

C. UTAH CODE ANN. §48-2b-125 DEFINES THE RIGHTS BETWEEN MANAGEMENT OF THE LIMITED LIABILITY COMPANY AND ITS MEMBERS.

Appellants have based their claim of duty by Mt Olympus on Utah Code Ann. §48-2b-125 which provides that any manager or managing member of a limited liability company "has authority to bind the limited liability company, unless otherwise provided in the articles of organization or operating agreement." Utah Code Ann. §48-2b-125. Appellants position is simply wrong. That provision addresses the rights as between management of the limited liability company and its members. That provision likewise expressly allows the members to, among themselves, change or limit that authority in the articles of organization or the operating agreement. This allows members of the limited liability company to define who shall manage the company, and provides a member redress against any member or manager acting beyond their authority.

The provision does not, however, alter the clear statutory language that any manager can bind the limited liability company. Utah Code Ann. §48-2b-127. To read the statute as contended by Appellants would place an onerous and nearly impossible burden on those contracting with a limited liability company because it would require that person to inspect and examine the operating agreement which is not filed with the State and which is not a public

record. Indeed, the logical source to obtain the operating agreement would be the individual representing the limited liability company in the transaction -- the same individual whose authority is in question and who, if he doesn't have authority, has motive and additional opportunity to deceive. Under Appellants' argument, this may not even be enough. The lender, if provided with an operating agreement, would have no way to independently verify that it was authentic and valid. Thus, Utah Code Ann. §48-2b-125, in part, was an acknowledgment by the Legislature that it is more efficient and practical that members of limited liability companies police themselves rather than shift that burden to third parties.

Appellants' contention that Utah Code Ann. §48-2b-125 necessarily limits and restricts section Utah Code Ann. §48-2b-127, is contrary to the language of both sections and would frustrate the obvious purpose behind the clear wording of Utah Code Ann. §48-2b-127 of the Utah Code. Thus, Judge Stirba correctly granted Mt Olympus' Motion to Dismiss and the Court of Appeals properly affirmed.

II. WHERE JEREZ ACTED WITHIN THE LLC'S ORDINARY OR APPARENT SCOPE OF BUSINESS, WHERE THE ARTICLES OF ORGANIZATION DID NOT LIMIT JEREZ'S AUTHORITY, WHERE UTAH CODE ANN. §48-2b-127 GAVE MT. OLYMPUS REASON TO BELIEVE JEREZ HAD AUTHORITY AND WHERE MT. OLYMPUS RELIED ON THE APPEARANCE OF AUTHORITY AND CHANGED ITS POSITION, NO FURTHER INQUIRY WAS REQUIRED.

Appellants argue that a lender in a commercial loan setting has a due diligence requirement to determine the authority of a manager to bind the limited liability company above that required by Utah Code Ann. §48-2b-127[9]. Appellants argue that this is a case of first

[9] Appellants state that this question is one of first impression in Utah and in the nation. However, with the repeal of Utah Code Ann. §48-2b-127 it actually becomes a question of "only" impression because resolution will affect these parties and no one else.

impression and therefore the Court should look to cases involving corporate and partnership entities to determine the question in this instance involving limited liability companies.

The argument and citations employed by Appellants beg the question. The cases cited do not establish that a lender has any legal due diligence requirement. A lender has no such duty. At most, Appellants use the cases to argue that one claiming to act on behalf of a corporation or a partnership must have authority. But nothing in the cases cited suggest that a lender must verify that authority before loaning money where the public document of the entity does not limit the authority, where the public document expressly authorized the type of transaction and where a statute expressly authorizes reliance on the one executing the documents. One must distinguish between the legal requirement of due diligence and the mere wisdom of due diligence. In this case, once Mt. Olympus had reviewed the public Articles of Organization establishing Jerez's manager status no other inquiry was required.

A. A CORPORATE RESOLUTION IS NOT ALWAYS NECESSARY BEFORE AN OFFICER OR AGENT OF THE CORPORATION HAS AUTHORITY TO BIND THE CORPORATION.

Appellants rely upon Western Fiberglass v. Kirton, McKonkie and Bushnell, 789 P.2d 34 (Utah Ct. App. 1990) to argue that without a corporate resolution no officer or agent has authority to bind the corporation in a real estate deal. Western, however, did not address that issue but rather a different question of whether or not a law firm acting on behalf of a corporation can benefit from Utah's indemnification statute Utah Code Ann. §16-10-4 as an "agent" of the corporation.

The Western Court analyzed not only Utah Code Ann. §16-10-4 but three other sections using "agent" in relation to corporations. The Court concluded that agents are "corporate

personnel who exercise management discretion and who have authority to bind the corporation." Western at page 39. Western does not stand for the idea that one cannot bind a corporation in a real estate deal without a corporate resolution and certainly does not stand for the idea that a lender in a commercial transaction has a due diligence requirement to verify corporate authority. Rather, it stands for the idea that if one wants statutory protection when acting on behalf of corporations they must act with proper authority[10].

However, there is also authority in Utah that indicates that a corporate resolution is not always necessary before a corporation can be bound. In Peterson v. Holmgren Land & Livestook Co. 363 P.2d 786 (Utah 1961) the Court stated that in a family corporation where the articles of incorporation provided for the purchase of real property and the father/president entered a contract on behalf of the corporation, that he had ostensible (apparent) authority even where there were not sufficient corporate minutes authorizing him to act. The Peterson Court quoting 13 Am. Jur. Sec. 890 at page 871-872 said,

> If a corporate officer assuming to contract on behalf of the corporation is one to whom authority to make such a contract may be given, a person dealing with him in good faith in not affected by the fact that the proper steps to clothe him with such authority were not taken.

Id. at page 788. See also Amoss v. Bennion 420 P.2d 47 at 49 (Utah 1966).

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[10] The Western Court as dicta in a footnote does state that without board resolution no officer or agent has authority to bind the corporation in a real estate deal. In so doing Western cites Foster v. Blake Heights Corp., 530 P.2d 815, 818 (Utah 1975). Foster, also in dicta, states the same but was discussing the specific issue of a corporate secretary not ordinarily having the authority to bind a corporation where in that case the secretary had indicated the contract in question required the signature of the corporate president and had actually left space for the President to sign.

In this case, the Articles of Organization named Jerez as the manager and stated that the purpose of the LLC was to purchase and develop real property. Add to this, Mt. Olympus's reliance on Utah Code Ann. §48-2b-127 which states that a manager of a LLC can bind the LLC relative to property and Appellants' reliance on Western as authority that further due diligence was required of Mt. Olympus is mistaken.

B. JEREZ ACTED WITHIN THE EXPRESS SCOPE OF THE LLC'S BUSINESS THEREFORE MT. OLYMPUS HAD NO FURTHER BURDEN TO ESTABLISH JEREZ'S AUTHORITY.

In an effort to persuade the Court that as far as partnerships are concerned a lender must verify the actual or apparent authority of the signing partner Appellants cite Luddington v. Bodenvest, Ltd. 855, P.2d 204 (Utah 1993). Appellants' reliance on Luddington is misplaced. The portion of Luddington cited by Appellants also stand for the idea that one can rely upon a partner who acts within the scope of the partnership business. In so doing, Luddington cites Peterson v. Armstrong 66 P. 767 (Utah 1901). The Peterson Court stated:

> The law is well settled that a partner without special authority, has no power to bind the firm in any transaction which is without the ordinary or apparent scope of the partnership business. Of this the plaintiff was bound to take notice and, having entered into a transaction with one partner, which was not, as clearly appears from both the pleadings and proof, within such scope, and having brought this suit to establish liability on the part of the other partners, the burden was upon her to show either that the contracting partner had special authority, or that the transaction was afterwards ratified by the other partners who she seeks to hold liable[11].

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[11] This concept, that a partner acts as an agent of the partnership and the act of every partner binds the partnership including execution in the partnership name of any instrument for apparently carrying on in the usual way the business of the partnership has been codified in Utah Code Ann. §48-1-6.

In the present case, Jerez was obtaining a loan from Mt. Olympus for the exact and express purpose for which the LLC was organized, to "develop a parcel of real estate... located at 3664 East 7650 South, Salt Lake City, Utah." See Appendix "A," paragraph 8 and 9, and Appendix "C," emphasis added. The stated purpose of this loan was clearly within the "ordinary or apparent scope of the partnership business."

Even if partnership law were to apply, rather than the express language of Utah Code Ann. §48-2b-127, under Peterson as cited in Luddington, Mt. Olympus has no burden as to the partner's, in this case Jerez's, authority if the transaction was within the scope of the partnership. In this case Jerez acted completely within the scope of the LLC's business[12]. Luddington, Peterson, Utah Code Ann. §48-1-6, Utah Code Ann. §48-2b-127 and the new Utah Code Ann. §48-2c-802 all support Mt. Olympus.

Notwithstanding the above, Luddington says much more and can be further distinguished. Most glaring, is that in Luddington the Certificate of Limited Partnership, a public document, expressly limited the authority of the general partner. See Luddington at page 209. In this case, the Articles of Organization, the LLC's public document, did not limit the authority of Jerez, the LLC's manager.

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[12] Not only did Jerez act within the scope of the LLC's business, Mt. Olympus did not bring suit to "establish liability on the part of the other partners," one of the burden shifting elements of Peterson and therefore the burden was not upon Mt. Olympus.

C. JEREZ HAD APPARENT AUTHORITY TO BIND THE LLC WHERE THE ARTICLES OF ORGANIZATION NAMED HIM AS THE LLC'S MANAGER, THE ARTICLES WERE A PUBLIC DOCUMENT, MT. OLYMPUS BELIEVED JEREZ HAD AUTHORITY, UTAH CODE ANN. §48-2b-127 GAVE MT. OLYMPUS REASON TO BELIEVE JEREZ HAD AUTHORITY, AND MT. OLYMPUS HAD CHANGED ITS POSITION IN RELIANCE ON JEREZ'S AUTHORITY.

Luddington also analyses the doctrines of agency, both actual and apparent authority. The Court stated:

> In order to show apparent authority, the following must be established:
> (1) that the principal has manifested his [or her] consent to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority; (2) that the third person knew of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and (3) that the third person, relying on such appearance of authority, has changed his [or her] position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principle.

Luddington at page 209.

In the present case the LLC manifested its consent to Jerez exercising the authority to obtain the loan from Mt. Olympus in order to further the express objective of the LLC to develop property when it stated its purpose and named Jerez as its manager in the Articles of Organization, a pubic document. Mt. Olympus knew of this fact because the Articles of Organization are a public document. Mt. Olympus evidently believed that Jerez had authority because it executed the transaction and gave Jerez the money. Mt. Olympus had reason to believe Jerez had the authority because the law at the time of the transaction, Utah Code Ann. §48-2b-127 states:

> (2) Instruments and documents providing for the mortgage...of property of the limited liability company shall be valid and binding upon the limited liability company if they are executed by one or more managers...

Lastly, Mt. Olympus, relying on the Articles of Organization and Utah Code Ann. §48-2b-127 changed its position by issuing a loan to the LLC for $25,000.00. Mt. Olympus will be injured if the LLC is not bound by the acts of Jerez.

D. EQUITY REQUIRES THAT IF THERE IS A CHOICE BETWEEN MT. OLYMPUS OR APPELLANTS AS TO WHO SHOULD SUFFER BECAUSE OF JEREZ'S ACTION IT SHOULD BE APPELLANTS BECAUSE THEY CREATED THE CIRCUMSTANCES MAKING THE LOSS POSSIBLE.

Luddington states that the doctrine of apparent authority has its roots in equitable estoppel and that it is founded on the idea that where one of two persons must suffer from the wrong of a third the loss should fall on that one whose conduct created the circumstances which made the loss possible. See Luddington at page 209.

This matter cries out for such an application. Jerez was the Appellants' choice as a joint venturer, a member of the LLC and the LLC's manager. The Appellants clothed him with managerial authority. The Appellants sat in a room with Jerez while both the Articles of Organization and the Operating Agreement were signed. They could have easily restricted his authority in the Articles, the public document, so that third parties. like Mt. Olympus, would be on notice of any restrictions. This they did not do and this is exactly what the new Utah Code Ann. §48-2c-802 requires.. The Appellants relied upon Jerez. The Appellants know to whom they must look for redress as they have alleged in their complaint that Jerez breached his fiduciary duties to Appellants and converted the loan proceeds to his own use and that he failed

to use reasonable and good judgment. Appellants failed to supervise Jerez or even watch their investment. They failed to see that a mortgage was recorded or the very public process of the foreclosure. In short, they waited until Mt. Olympus would suffer the most before stepping forward to finally police their partner, Jerez.

The burden of Jerez's bad character and bad acts must be borne by Appellants. This, of course, is especially true where Jerez was acting within the express scope of the LLC's business, the public document clothed him with managerial authority and the statutory scheme then and now sustain Mt. Olympus's reliance[13]. Applying the agency analysis of the cases cited, Jerez acted with apparent authority and Mt. Olympus had no further inquiry than that required by Utah Code Ann. §48-2b-127.

III. UNDER THE NEW STATUTE UTAH CODE ANN. §48-2c-802 JUDGE STIRBA'S DISMISSAL OF APPELLANTS' COMPLAINT WOULD HAVE BEEN EQUALLY CORRECT.

Appellants completely misstate Utah Code Ann. §48-2c-802. Appellants state that this section expressly limits the power of the manager "to only bind the company, even in real property situations, only if they are allowed to do so by the Articles of Incorporation." See the bottom of page '11' of Appellants' brief. This is absurd.

The statute reads in relevant part:

(2) Except as provided in Subsection (3), in a manager managed company

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[13] Luddington has at least one further distinguishing point. The general partner took the loan in Luddington for his own purposes unrelated to the business of the partnership. As the dissent stated, "imposing, defacto, an extraordinary high duty of inquiry on the Lender to police the internal operations of a partnership that had the misfortune of having" a manager such as Jerez, in this case, would be improper.

(a) each manager is an agent of the company for the purpose of its business;

(b) a member is not an agent of the company for the purpose of its business solely by reason of being a member;

(c) an act of a manger, including the signing of a document in the company name, for apparently carrying on in the ordinary course of the company business, or business of the kind carried on by the company, binds the company unless the manager had no authority to act for the company in the particular matter and the lack of authority was expressly described in the articles of organization or the person with whom the manager was dealing knew or otherwise had notice that the manager lack authority; and

(d) an act of a manager which is not apparently for carrying on in the ordinary course of the company business, or business of the kind carried on by the company, binds the company only if the act was authorized by the members in accordance with Subsection 48-2c-803(2) or (3).

(3) Notwithstanding the provision of Subsections (1) and (2), unless the articles of organization expressly limit their authority, any member in a member-managed company, or any manager in a manger managed company, may sign, acknowledge, and deliver any document transferring or affecting the company's interest in real or personal property, and if the authority is not so limited, the document shall be conclusive in favor of a person who gives value without knowledge of the lack of authority of the person who signs and delivers the document.

This statute could not be any clearer. It does not further limit the power of managers, as argued by Appellants, it actually clarifies and expands the authority of managers. If the Articles of Organization, a public document giving constructive notice to all who deal with the LLC, does not expressly describe the lack of authority of a manager and the manager was apparently carrying on in the ordinary course of the business then the company is bound. Utah Code Ann. §48-2c-802(3) goes even further. "Unless the Articles of Organization expressly limit" the manger's authority, the manager can do exactly what Jerez did in this case.

Under this new statutory scheme Judge Stirba would have been equally correct in *dismissing Appellants' complaint.*

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the Honorable Anne M. Striba's decision should be affirmed.

DATED this 27th day of November, 2001.

ATKIN & HAWKINS, P.C.

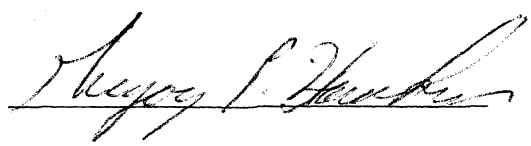
Gregory P. Hawkins
Attorneys for Respondent
Mt Olympus Financial, LC

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing BRIEF OF APPELLEE MT. OLYMPUS FINANCIAL, L.C. was mailed, postage prepaid, this 30 day of November, 2001 to the following:

Bruce R. Baird
BAIRD & JONES, L.C.
201 South Main, Suite 900
Salt Lake City, Utah 84111

Dean H. Becker
324 South 400 West, Suite E
Salt Lake City, Utah 84101



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Tab A

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

NAMVAR TAGHIPOUR, and DANESH RAHEMI, M.D., individuals and JEREZ, TAGHIPOUR AND ASSOCIATES, LLC, a Utah limited liability company Plaintiffs, vs. EDGAR C. JEREZ, an individual, and MOUNT OLYMPUS FINANCIAL, L.C., a Utah limited liability company, Defendants.	**COMPLAINT** **JURY DEMAND** Civil No.: 990903853 Judge: Stirba

Plaintiffs Namvar Taghipour, Danesh Rahemi, M.D., and Jerez, Taghipour and Associates, L.L.C., complain of Defendants and for cause of action allege as follows:

FACTS

1. Namvar Taghipour ("Taghipour") is and was at all times material hereto, a resident of Salt Lake County, State of Utah.

2. Dr. Danesh Rahemi ("Rahemi") is and was at all times material hereto, a resident of the State of Massachusetts.

3. Edgar C. Jerez ("Jerez") is and was at all times material hereto, a resident of Salt Lake County, State of Utah.

4. Jerez, Taghipour and Associates, LLC, ("the LC") is a Utah limited liability company

5. Mount Olympus Financial, L. C., ("Olympus") is a Utah limited liability company with its principal place of business at 330 South 300 East, Suite 100, Salt Lake City, Utah 84111.

6. On August 30, 1994 Taghipour, Rahemi and Jerez formed the LC.

7. The initial registered office of the LC was 10 Exchange Place, Suite 309, Salt Lake City, Utah.

8. The purpose of the LC was to purchase and develop a parcel of real estate under a joint venture agreement.

9. The parcel of land that the LC wished to purchase was located at 3664 East 7650 South Salt Lake City, Utah 84121 ("the Property").

10. Membership and contributions in and to the LC were divided among six individuals: Defendant Edgar C. Jerez, Plaintiffs Taghipour and Rahemi, Ksai Liang, Orlando Jerez and Dean Becker.

11. On August 31, 1994 the owners of the Property conveyed the Property to the LC.

12. The Articles of Organization of the LC listed Defendant Edgar Jerez as the manager of the LC.

13. According to Section 3.4 of the Operating Agreement no loans were allowed to be contracted on behalf of the LC without a resolution by the members.

14. The Operating Agreement prescribes that formal actions by members require a 51% majority of the ownership interest.

15. The Operating Agreement further provides that voting in the LC will to be in accordance with the percentage of the member's equity ownership interest.

16. On January 10, 1997 without obtaining approval as required under the Operating Agreement and without the knowledge or consent of the LC, Jerez unilaterally entered into a loan agreement with Olympus ("the Olympus Loan") whereby he gave Olympus a Deed of Trust to the Property to secure a Trust Deed Note for $25,000.00.

17. Olympus disbursed to Jerez only $20,000 of the $25,000 Olympus Loan keeping $5,000 as an origination fee, points or some other financing inducement.

18. Jerez defaulted on the Olympus Loan.

19. The other LC members never received any notices of default or of the pending foreclosure sale.

20. Plaintiffs continued to make payments on the promissory note to the underlying landowners of the Property.

21. Olympus foreclosed on the Property.

22. Even after the Olympus foreclosure the Plaintiffs made a payment on the Property.

23. Only after the foreclosure sale did the Plaintiffs learn that the Property had been mortgaged by Jerez to obtain the Olympus Loan.

FIRST CLAIM FOR RELIEF
(Against Jerez: Accounting/Constructive Trust)

Plaintiffs reallege and incorporate by reference all of the allegations contained in Paragraphs 1 through 23.

24. Under the Operating Agreement of the LC Jerez agreed to account to Plaintiffs for all monies collected and disbursed by him for the LC.

25. Jerez has collected at least $25,000 allegedly on behalf of the LC.

26. An accounting is necessary to show the amount due to Plaintiffs from Jerez.

27. A constructive trust should be placed on all assets of Jerez to recover to the Plaintiffs all of the monies shown by the accounting to have been improperly dealt with by Jerez.

SECOND CLAIM FOR RELIEF
(Against Jerez: Breach of Fiduciary Duties)

Plaintiffs reallege and incorporate by reference all of the allegations contained in Paragraphs 1 through 23.

28. As the managing member Jerez owed fiduciary duties to the LC.

29. Under the Articles of Organization and the Operating Agreement of the LC Jerez, as the managing member, could not enter into a loan transaction unless agreed to by the other members.

30. Jerez breached his fiduciary duties to the LC by entering into the Olympus Loan without obtaining proper approvals and then converting the proceeds to his own personal use.

31. Jerez further breached his fiducuiary duty by failing to give the Plaintiffs notice of his actions so that they may cure the default.

32. Jerez did not use reasonable care or good business judgement.

33. As a direct and proximate result of Jerez' actions and inactions Plaintiffs have sustained damages in an amount to be determined at trial consisting of the following: loss of the Property, money paid out to the underlying landowners, and interest that would otherwise have accrued on Plaintiffs' accounts.

THIRD CLAIM FOR RELIEF
(Against Olympus: Declaratory Judgment)

Plaintiffs reallege and incorporate herein by reference all of the allegations contained in Paragraphs 1 through 23.

34. Rights, duties and obligations as members of a limited liability company are created and limited under Utah law by the company's Articles of Organization and its Operating Agreement.

35. A dispute now exists between the Plaintiffs and Olympus as to the Olympus Loan and foreclosure of the Property.

36. This action for declaratory judgment is brought under Section 78-33-1, et seq, Utah Code Annotated.

37. The Plaintiffs are entitled to declaratory judgment that the Olympus Loan and the accompanying mortgage of the Property and subsequent foreclosure were invalid because Olympus failed to determine that Jerez did not have the power to take the actions that he did under the Article and Operating Agreement of the LC.

FOURTH CLAIM FOR RELIEF
(Against Olympus: Negligence)

Plaintiffs reallege and incorporate by reference all of the allegations contained in Paragraphs 1 through 23.

38. Olympus owed a duty of which the Plaintiffs were beneficiaries to determine if Jerez had the authority to execute the Olympus Loan.

39. The standard of care in the financing industry requires such due diligence in part for the benefit of innocent third-parties such as the Plaintiffs.

40. Olympus breached this duty and standard of care by failing to obtain verification of the propriety of Jerez's entry into the Olympus Loan.

41. Olympus failed to verify whether or not the managing member could mortgage the corporate property to secure a debt.

42. On information and belief Olympus never inspected the Operating Agreement or other documentation of the LC to determine whether Jerez had the authority to mortgage the Property.

43. Olympus' reliance was not reasonable and breached its standard of care.

44. The standard of care would have required Olympus to have had written documentation that Jerez had appropriate authority to execute the Olympus Loan and mortgage the Property.

45. Olympus knew, or should have known that managing members of limited liability companies do not always have the authority to unilaterally obtain loans and/or mortgage company property.

46. The Olympus Loan violated Olympus's standard of care and duties to the Plaintiffs and the LC.

47. As a direct and proximate result of Olympus' actions the Plaintiffs have sustained damages in an amount to be determined at trial consisting of the following: loss of the Property, money paid out to the underlying landowners, and interest that would otherwise have accrued on Plaintiffs' accounts.

FIFTH CLAIM FOR RELIEF
(Against Olympus: Partition)

Plaintiffs reallege and incorporate herein by reference all of the allegations contained in Paragraphs 1 through 23.

48. Pursuant to Chapter 39 of Title 78 , U.C.A., the Plaintiffs are entitled to a partition of the various interests in the Property *viv a vis* Olympus.

SIXTH CLAIM FOR RELIEF
(Dissolution of LC)

Plaintiffs reallege and incorporate herein by reference all of the allegations contained in Paragraphs 1 through 23.

49. Pursuant to Section 48-2b-142(1)(a), (b) and (c), U.C.A., the Plaintiffs are entitled to dissolution of the L.C. and to an accounting and settlement of the assets of the L.C. pursuant to Section 48-2b-138, U.C.A.

SEVENTH CLAIM FOR RELIEF
(Quiet Title)

Plaintiffs reallege and incorporate herein by reference all of the allegations contained in Paragraphs 1 through 23

50. Plaintiffs are entitled to have the title to the Property quieted in them as against Olympus.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request:

1. Judgment against Jerez on the First Claim for Relief for an accounting to Plaintiffs for all money and property received on behalf of the LC by Jerez and the imposition of a constructive trust on all such wrongfully appropriated monies;

2. Judgment against Jerez on the Second Claim for Relief for damages in an amount to be determined at trial;

3. Judgment on the Third Claim for Relief declaring that the Trust Deed and Trust Deed Note in favor of Olympus are void, and that Olympus has no interest in the Property as a result of the foreclosure sale.

4. A declaration on the Third Claim for Relief that the Plaintiffs are the owners and holders of the undivided interests in the Pproperty.

5. Judgment on the Fourth Claim for relief for damages against Olympus in an amount to be determined at trial.

6. On their Sixth Claim for Relief for partition of the Property.

7. On the Sixth Claim for Relief the Plaintiffs pray for a dissolution of the L.C. and for an accounting and settlement of the assets of the L.C. pursuant to Section 48-2b-138, U.C.A.

8. On the Seventh Claim for relief for an order quieting title to the Property in the Plaintiffs.

9. Any other relief that this Court considers proper.

JURY DEMAND

The Plaintiffs request that issues triable before a jury be so heard.

DATED this 18th day of June, 1999.

BAIRD & JONES, L.C.

Bruce R. Baird
Attorneys for the Plaintiffs

Addresses of the Plaintiffs:

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Holladay, UT 84117

Dr. Danesh Rahimi
60 Tanglewood Road
Newton, MA 02159

Tab B

***421921** 2001 UT App 139

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Utah.

Namvar TAGHIPOUR and Danesh Rahemi, M.D., individuals; and Jerez, Taghipour, and Associates, LLC, a Utah limited liability company, Plaintiffs and Appellants,

v.

Edgar C. JEREZ, an individual; and Mount Olympus Financial, L.C., a Utah limited liability company, Defendants and Appellees.

No. 20000047-CA.

April 26, 2001.

Two members of limited-liability company (LLC) and the LLC brought action against third member and lender, seeking declaration that loan agreement entered into by lender and third member was invalid, claiming damages for lender's negligence, and seeking partition of LLC property that secured loan. The Third District Court, Salt Lake Department, Anne M. Stirba, J., granted lender's motion to dismiss. Two members and LLC appealed. The Court of Appeals, Thorne, J., held that: (1) third member, as manager, had right to bind LLC to loan agreement without vote by all members, and (2) lender took all steps necessary to determine that third member was manager.

Affirmed.

Orme, J., concurred and filed opinion.

[1] Appeal and Error ⚿863
30 ----
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 In General.

Propriety of a dismissal based on failure to state a cause of action upon which relief may be granted is a question of law; therefore the Court of Appeals reviews a trial court's ruling for correctness. Rules Civ.Proc., Rule 12(b)(6).

[2] Appeal and Error ⚿842(1)
30 ----
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) In General.

Court of Appeals reviews questions of statutory interpretation for correctness, according no deference to the trial court's conclusions.

[3] Appeal and Error ⚿842(1)
30 ----
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) In General.

The Court of Appeals reviews a trial court's rulings of law for correctness.

[4] Statutes ⚿188
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 In General.

[See headnote text below]

[4] Statutes ⚿212.6
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.6 Words Used.

Rules of statutory construction require that a court look first to the plain language of a statute and assume that each term was used advisedly by the legislature.

[5] Statutes ⚿223.4
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.4 General and Special Statutes.

A more specific statutory provision always takes

precedence over a more general statutory provision.

[6] Corporations ⚿410
101 ----
101XI Corporate Powers and Liabilities
101XI(B) Representation of Corporation by Officers and Agents
101k410 Purchases, Sales, and Warranties.

[See headnote text below]

[6] Corporations ⚿415
101 ----
101XI Corporate Powers and Liabilities
101XI(B) Representation of Corporation by Officers and Agents
101k415 Bonds and Mortgages.
Manager has statutory authority to unilaterally bind a limited-liability company (LLC) to instruments and documents providing for the acquisition, mortgage, or disposition of LLC property, even if LLC's operating agreement requires ratification by members' vote. U.C.A. 1953 §§ 48-2b-135(2)(b), 48-2b-127(2).

[7] Constitutional Law ⚿70.1(4)
92 ----
92III Distribution of Governmental Powers and Functions
92III(B) Judicial Powers and Functions
92k70 Encroachment on Legislature
92k70.1 In General
92k70.1(4) Determination of Facts; Emergency or Public Interest.

[See headnote text below]

[7] Constitutional Law ⚿81
92 ----
92IV Police Power in General
92k81 Nature and Scope in General.
It is the power and responsibility of the legislature to enact laws to promote the public health, safety, morals, and general welfare of society, and the Court of Appeals will not substitute its judgment for that of the legislature with respect to what best serves the public interest.

[8] Corporations ⚿425(5)
101 ----
101XI Corporate Powers and Liabilities
101XI(B) Representation of Corporation by Officers and Agents
101k425 Estoppel to Deny Authority or Acts in General
101k425(5) Estoppel of Corporation by Acts or Declarations.
Lender took the steps necessary to determine that borrower was manager of limited-liability company (LLC), such that LLC was bound by loan agreement, although LLC's operating agreement provided that no loan could be contracted on behalf of the LLC without resolution approved by its members, where lender correctly concluded that borrower was manager, and lender was not required by Limited Liability Act to inquire further about operating agreement. U.C.A. 1953 § 48-2b-127(2).

[9] Appeal and Error ⚿169
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k169 Necessity of Presentation in General.
As a general rule, claims not raised before the trial court may not be raised on appeal.

Third District, Salt Lake Department.

The Honorable Anne M. Striba.

Bruce R. Baird and Dean H. Becker, Salt Lake City, for Appellants.

Blake S. Atkin and Jonathan Hawkins, Salt Lake City, for Appellees.

Before Judges BILLINGS, ORME, and THORNE.

OPINION

THORNE, Judge:

**1 ¶ 1 Plaintiffs Namvar Taghipour, Danesh Rahemi, M.D., and Jerez, Taghipour and Associates, LLC, appeal from an order dismissing their claims against defendant Mt. Olympus Financial, L.C. (Mt.Olympus). We affirm.

BACKGROUND

¶ 2 On August 30, 1994, Taghipour, Rahemi, and co-defendant Edgar Jerez (Jerez) formed Jerez, Taghipour and Associates, LLC (the LLC). The group formed the LLC to purchase and develop a parcel of real estate (the Property) under a joint venture agreement. The LLC's Articles of Organization listed Jerez as a LLC member and a manager, while its Operating Agreement provided that no loan could be contracted on behalf of the

LLC without a resolution approved by its members

¶ 3 On August 31, 1994, the LLC acquired the Property On January 10, 1997, Jerez, unbeknownst to the LLC's other members or managers, unilaterally entered into a loan agreement for $25,000 with Mt Olympus on behalf of the LLC To secure the loan, Jerez executed and delivered a trust deed on the Property to Mt Olympus Subsequently, Mt Olympus dispersed $20,000 of the funds to Jerez and kept the remaining $5,000 for various fees Jerez apparently misappropriated the $20,000 The LLC, unaware of the loan, ultimately defaulted on it and Mt Olympus foreclosed on the Property

¶ 4 On June 18, 1999, plaintiffs sued Mt Olympus and Jerez, asserting claims against Mt Olympus for (1) declaratory judgment, (2) negligence, and (3) partition In response, Mt Olympus filed a motion to dismiss The trial court granted Mt Olympus's motion, ruling that pursuant to Utah Code Ann § 48-2b-127(2) (1998), the documents executed by Jerez were binding upon the LLC Plaintiffs timely appealed

ISSUES AND STANDARDS OF REVIEW

[1] ¶ 5 "The propriety of a dismissal based on Utah R Civ P 12(b)(6) is a question of law, therefore we review the [trial] court's ruling for correctness " *Stokes v Van Wagoner,* 1999 UT 94,¶ 6, 987 P 2d 602

[2] ¶ 6 Plaintiffs argue the trial court's interpretation of section 48-2b-127(2) was in error, because a manager cannot unilaterally bind a limited liability company when the company's operating agreement or articles of organization require a majority vote or a resolution before undertaking such an act We review questions of statutory interpretation for correctness, according no deference to the trial court's conclusions *See Adkins v Uncle Bart's, Inc ,* 2000 UT 14,¶ 11, 1 P 3d 528

[3] ¶ 7 Plaintiffs next argue the trial court erred by ruling, as a matter of law, that Mt Olympus had taken the steps necessary to determine Jerez was a LLC manager We review a trial court's rulings of law for correctness *See Munford v Lee Servicing Co ,* 2000 UT App 108,¶ 10, 999 P 2d 23

¶ 8 Finally, plaintiffs argue the trial court erred by dismissing their partition claim against Mt Olympus This also presents a question of law, which we review for correctness *See id.*

ANALYSIS

A Statutory Interpretation of Utah Code Ann § 48-2b-127

**2 ¶ 9 Plaintiffs argue the Mt Olympus loan agreement, unilaterally executed by Jerez on behalf of the LLC, is invalid because the LLC's Operating Agreement requires membership approval before such an undertaking Plaintiffs assert that section 48-2b-127(2), a Utah Limited Liability Act provision, requires such a result

[4][5] ¶ 10 The rules of statutory construction require that we look "first to the plain language of a statute and assume[ ] that each term was used advisedly by the [L]egislature ' *Biddle v Washington Terrace City,* 1999 UT 110,¶ 14, 993 P 2d 875 Further, "it is well settled that a more specific [statutory] provision always takes precedence over a more general [statutory] provision " *State v Hinson,* 966 P 2d 273, 277 (Utah Ct App 1998), *see also Southern Utah Wilderness Alliance v Board of State Lands & Forestry,* 830 P 2d 233, 235 (Utah 1992)

[6] ¶ 11 In the present matter, plaintiffs argue that Utah Code Ann § 48-2b-125(2)(b) (1998) and Utah Code Ann § 48-2b-127(2) (1998) should be read in harmony, and therefore, section 48-2b-125(2)(b)'s restrictions on manager authority should be incorporated into section 48-2b-127(2) In pertinent part, section 48-2b-125(2)(b) states "If the management of the limited liability company is vested in a manager or managers, any manager has authority to bind the limited liability company, *unless otherwise provided in the articles of organization or operating agreement* " Utah Code Ann § 48-2b-125(2)(b) (1998) (emphasis added) In contrast, section 48-2b-127(2) states "Instruments and documents providing for the acquisition, mortgage, or disposition of property of the limited liability company shall be valid and binding upon the limited liability company if they are executed by one or more managers " *Id* § 48-2b-127(2)

¶ 12 The plain language of section 48-2b-127(2) provides no limitations on a manager's authority to execute specified instruments and documents, and thus, bind the limited liability company Further, assuming, as we must, that "each term [in section 48-2b-127(2)] was used advisedly by the

[L]egislature," *Biddle,* 993 P 2d 875, 1999 UT 110 at ¶ 14, we find no reason to suggest that had the Legislature intended section 48-2b-127(2) to include the same restrictions set forth in section 48-2b-125(2)(b), the Legislature would have omitted those restrictions

¶ 13 Additionally, plaintiffs' argument ignores the well-established rule of construction that specific statutory provisions prevail over general statutory provisions *See Hinson,* 966 P 2d at 277 Section 48-2b-127(2) states, in no uncertain terms, "[i]nstruments and documents *shall be valid and binding* upon the limited liability company if they are executed by one or more managers " Utah Code Ann § 48-2b-127(2) (1998) (emphasis added) Accordingly, the specific requirements of section 48-2b-127(2) must control over the general application of section 48-2b-125(2)(b)'s restrictions

**3 [7] ¶ 14 Finally, we acknowledge plaintiffs' concern that 'the documents listed in [section] 48-2b-127 have the greatest potential for damage to a limited liability company because they are encumbering the property of the limited liability company " However, "[i]t is the power and responsibility of the [L]egislature to enact laws to promote the public health, safety, morals, and general welfare of society and [we] will not substitute our judgment for that of the [L]egislature with respect to what best serves the public interest " *Bastian v King,* 661 P 2d 953, 956 (Utah 1983), *see also Redwood Gym v Salt Lake County Comm'n,* 624 P 2d 1138, 1141 (Utah 1981) (stating that "it is not the function of [appellate] court[s] to evaluate the wisdom or practical necessity of legislative enactments"), *State v Mason,* 94 Utah 501, 509, 78 P 2d 920, 923 (1938) (stating that the judiciary "cannot supplant [the Legislature s] judgment" with its own)

¶ 15 Furthermore, we can conceive of several reasons why the Legislature might choose not to expand the protections for stockholders of a limited liability company in transactions involving the mortgage of real property These reasons may include the need to facilitate transactions involving the transfer of title to property and mortgages from the original parties to new parties, and the limited access these new parties have to organic documents not revealed in a title search

¶ 16 It is not necessary for our purpose, however, that we identify a specific basis for the Legislature's decision Rather, all that is required is that we acknowledge the Legislature's right to exercise its judgment It is not for us to evaluate, as plaintiffs would have us do, the wisdom of the Legislature's choice in light of alternative courses of action Accordingly, we find no error in the trial court's interpretation of section 48-2b-127(2)

B Requirements of Utah Code Ann § 48-2b-127(2)

[8] ¶ 17 Plaintiffs next argue the trial court erred by ruling, as a matter of law, that Mt Olympus had taken the steps necessary to determine Jerez was a LLC manager Plaintiffs contend the loan agreement was "invalid because [Mt] Olympus failed to determine that Jerez did not have the power to take the actions he did under the [LLC's] Articles [of Organization] and Operating Agreement Mt Olympus, however, correctly concluded that Jerez was a manager of the LLC, and section 48 2b-127(2) requires nothing more Accordingly, the trial court correctly determined that Mt Olympus took the steps necessary to determine Jerez was a manager of the LLC, and therefore, satisfied the requirements of section 48-2b-127(2)

C Partition

[9] ¶ 18 Finally, plaintiffs argue the trial court erred by dismissing their claim for partition After reviewing the trial memoranda of both parties, the trial court found section 48-2b-127(2) dispositive and dismissed plaintiffs' claims (FN1) Following dismissal, the record in this matter lacks an objection or any other attempt by plaintiffs to obtain a specific ruling on their partition claim "As a general rule, claims not raised before the trial court may not be raised on appeal " *State v Holgate,* 2000 UT 74,¶ 11, 10 P 3d 346 In addition, we note that plaintiffs' failure to establish that Jerez lacked the authority to bind the LLC also results in the failure of their partition claim We therefore decline to reach the merits of plaintiffs' partition claim

**4. ¶ 19 The judgment of the trial court is affirmed

¶ 20 I CONCUR Judith M Billings, Judge

ORME, Judge (concurring)

¶ 21 I concur in the court's opinion In so doing, I must note that I find the policy reflected in sections 48-2b-125(2)(b) and -127(2) to be quite curious If, as in this case, there are restrictions in a limited

liability company's organic documents on its managers' ability to unilaterally bind the company, those restrictions will be effective across the range of mundane and comparatively insignificant contracts purportedly entered into by the company, but the restrictions will be ineffective in the case of the company's most important contracts Thus, if the articles of organization or operating agreement provide that the managers will enter into no contract without the approval of the company's members, as memorialized in an appropriate resolution, the company can escape an unauthorized contract for janitorial services, coffee supplies, or photocopying, but is stuck with the sale of its property for less than fair value or a loan on unfavorable terms

¶ 22 Surely this is at odds with the expectations of the business community A manager or officer typically can bind the company to comparatively unimportant contracts, but, as is provided in the Operating Agreement in this case, needs member or board approval to borrow against company assets Financial institutions know this and are able to protect themselves by insisting on seeing articles of incorporation, bylaws, and board resolutions--or the limited liability company equivalents--as part of the mortgage loan process A cursory review of such documents in this case would have disclosed that Jerez lacked the authority to bind the company to the proposed loan agreement

¶ 23 In short, I suspect that the strange result in this case is not so much the product of carefully weighed policy considerations as it is the product of a legislative oversight or lapse of some kind That being said, I readily agree that the language of both statutory sections is clear and unambiguous and that it is not the prerogative of the courts to rewrite legislation If the laws which dictate the result in this case need to be fixed, the repairs must come via legislative amendment rather than judicial pronouncement

(FN1) The trial court ruled that "[t]he [Mt Olympus loan] documents executed by Mr Jerez are valid and binding on the [LLC] "

Tab C

MT OLYMPUS FINANCIAL, LC

330 SOUTH 300 EAST SUITE 100 SALT LAKE CITY, UTAH 84111. 801-596-8080. FAX 801-322-1890

te: 1/10/97 Purpose of Loan: Business ✓ Family/Household ____ Name of Business Jerez, Tarabour & Ass

planation of Purpose: Money for development of land for resale

ed for Bankruptcy none Filed When? ____ Dismissed When? ____

nount of Judgments and who they are owed to. none

orrower: Edgar C. Jerez ~~Tax ID#~~ SS# 529 - 90 - 7235

orrower: Jerez, Tarabour & Ass. SS# ____ - ____ - ____

ome Phone: (801) 943-0242 Work Phone: (801) 943-0242

operty Address: 7603 Prospector Dr Fed or State Tax Liens: none

S.L.C., Ut 84121 Other Liens: none

oan Amount Requested: $25,500.00 Referred By: Newspaper

st Mortgage Bal: 69000 Loan # ____ Co: West Pearson Phone #: ____

nd Mortgage Bal: ____ Loan # ____ Co. ____ Phone #. ____

rd Mortgage Bal:: ____ Loan # ____ Co ____ Phone #: ____

'alue of Property: $ 600,000.00 *Tax Value:* $ 40,000.00 *Comparables:* ____

We the undersigned hereby authorize Mt Olympus Financial, LC it's successors and/or assigns, to obtain any and all nformation necessary pertaining to the closing of this loan, including, but not limited to a Credit Report. The Borrowers igree that if this loan is canceled by Borrowers for any reason, ALL costs and fees associated with the loan process must be paid by Borrowers before the Trust Deed will be reconveyed, including but not limited to, Broker fees, origination fees. appraisal fees, title fees, processing fees, attorney's fees, etc. as shown on the closing statement. If Mt Olympus Financial, LC cancels the loan because of untrue information or misrepresentations provided by Borrowers. Borrowers will be responsible for costs and fees as stated above. If Mt Olympus Financial, LC cancels for any other reason, Borrowers will not be responsible for costs or fees.

EJ

Borrower 1/10/97 Date

Co-Borrower Date